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No. 73-1120

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL HELIUM CORPORATION, ET AL., PETITIONERS

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a–19a)[1] is reported at 486 F.2d 995. The opinion of the district court (App. 19a–73a) is reported at 361 F. Supp. 78.

JURISDICTION

The judgment of the court of appeals (App. 140a) was entered on October 19, 1973. The petition for a writ of certiorari was filed on January 17, 1974. This

[1] All "App." references are to the separately bound Appendix to the petition.

Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that the environmental impact statement in this case was adequate.

2. Whether the court of appeals correctly ruled that the Secretary of the Interior acted in accordance with the Helium Act and contract terms in cancelling certain contracts for the production of helium which the Secretary had found to be in excess of government needs.

3. Whether the determination of the Secretary of the Interior to cancel the contracts in this case was proper.

STATUTES INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4331, *et seq.*, the Helium Act, 43 Stat. 1110, as amended, 74 Stat. 918, 50 U.S.C. 167, *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 702, 703, 704, 706, are set forth in the Appendix to the Petition (pp. 120a–139a).

STATEMENT

The Helium Act Amendments of 1960, 50 U.S.C. 167 *et seq.*, authorized the Secretary of the Interior to enter into "contracts * * * for the acquisition * * * of helium * * * for such periods, not exceeding twenty-five years, as may be necessary to accomplish the purpose of the" Act. 50 U.S.C. 167a(a)(2). The Act's stated purpose is "to * * * provide, within economic limits, * * * a sustained supply of helium which,

together with supplies available or expected to become available otherwise, will be sufficient to provide for essential Government activities." 50 U.S.C. 167m. Acting pursuant to this authority, the Secretary in 1961 entered into helium purchase contracts with four companies.[2] The contracts, which would expire by their own terms in 1983, contained clauses permitting earlier termination if "in the opinion of the Secretary of the Interior, the discovery of large new helium resources or a substantial diminution in helium requirements or any circumstances of similar nature should occur which would make the continued purchase of helium * * * unnecessary to accomplish the purposes of the Act * * *" (App. 75a). Under the four contracts, the government received an annual average of 3.126 billion cubic feet of helium at an annual cost of more than $40,000,000 (App. 3a, 102a).

From fiscal 1962,[3] when total government helium requirements were 530 million cubic feet (mcf), government demand continued to rise, reaching a peak of 684 mcf in fiscal 1966. Government demand began declining in fiscal 1967 and has declined each year since, reaching the level of 280 mcf in fiscal 1972 (App. 3a, 108a).[4]

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[2] These consisted of the three petitioners and the Northern Helex Co., a non-party to this action. See App. 30a.

[3] The four contracts were entered into in fiscal 1962.

[4] 1972 is the most recent fiscal year for which statistics are found in the record. The Helium Act authorizes purchases "* * * for essential Government activities." 50 U.S.C. 167m. These annual government demand figures include both "essential Government" requirements and non-essential government requirements. In addition, non-government requirements have also declined dramatically. See table at App. 112a. See also App. 108a.

Under the contracts, the government has stored about 35 *billion* cubic feet of helium (App. 101a). During the entire purchase period, the Bureau of Mines, a governmental agency, has produced enough helium to satisfy all government requirements, and the government has not used any of the helium supplied by petitioners (App. 3a). The Secretary estimates that the present assured supply of helium available to the government after cancellation of these contracts is more than six times that necessary to satisfy essential government helium requirements through the year 2000 (App. 111a).

In January 1971, Under Secretary of the Interior Russell determined that a substantial diminution in helium requirements had occurred. Additionally, based on the discovery of substantial unexploited helium deposits in Wyoming and elsewhere, he also determined that there had been discovery of significant new helium resources (App. 117a). Accordingly, since the cost to the government of continuing to purchase now unneeded helium was considerable, he notified the contractors that he was invoking the termination clauses of the contracts (App. 75a–76a, 108a).[5]

Petitioners then bought this suit seeking declaratory and injunctive relief. The district judge, finding that the proposed termination, without benefit of an environmental impact statement, was likely to be deemed insufficient to satisfy the requirements of the National

[5] These actions were taken by Under Secretary Russell under standing delegations of authority at a time when the nominee for Secretary of the Interior had not yet been confirmed.

Environmental Policy Act, the Helium Act and the contracts in question, enjoined respondents from terminating the contracts (App. 95a–96a). The Secretary appealed, arguing that the cancellation of the contracts had no substantial effect on the environment. The court of appeals ruled that the district court had properly enjoined the proposed action because the Secretary had not complied with the requirements of NEPA (App. 73a, *et seq.*). The court also determined, however, that, apart from NEPA, the Secretary was acting within his proper discretion when he terminated the contracts (App. 74a–76a). None of the parties petitioned for certiorari.

Following this decision, the Department of the Interior undertook to comply with the court of appeals' mandate. In May 1972 the Department issued a draft Environmental Statement and distributed it broadly for comment (see App. 33a). In November 1972, after considering the numerous comments received (including those from petitioners), the Department issued a revised and expanded Final Environmental Impact Statement (App. 33a–34a).[6] Thereafter, the Secretary again cancelled the contracts, with an extensive written report covering the environmental (App. 97a–104a), economic and contractual (App. 104a–119a) reasons for his decision.

Petitioners then filed amended complaints in the district court, again challenging the Secretary's deci-

[6] A copy of the Final Environmental Statement, containing, with appendices, some 376 pages, has been lodged with the Clerk.

sion to terminate as inconsistent with NEPA, the Helium Act, the Administrative Procedure Act, and the contracts themselves. The district court, while discussing the contract and Helium Act issues, limited its holding to the Secretary's compliance with NEPA. It held that it had jurisdiction to review both the adequacy of the impact statement and, apparently under Section 101 of NEPA, 42 U.S.C. 4331, the substantive validity of the Secretary's decision (App. 45a, 49a, 72a). The district court held that the standard for review of each question is whether the Secretary's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *" (App. 44a). It then found that the discussion in the impact statement was deficient in a number of particulars and that, accordingly, the Secretary could not have weighed the issues involved in his decision to cancel as required by law. It remanded the case to the Secretary for further consideration in light of its opinion (App. 47a). The Secretary again appealed, and the court of appeals reversed. It adhered to its earlier decision that the Secretary, unless he had violated NEPA, acted lawfully in terminating the contracts (App. 6a–8a).

As to NEPA, the court of appeals stated that in reviewing the impact statement, rather than applying the arbitrary or capricious standard appropriate for judging agency action, the district court should have followed the more particular standards worked out by the courts of appeals for reviewing impact statements (App. 9a–10a). The court quoted with approval the following standard articulated in *Scientists' Institute for*

Public Information, Inc. v. *Atomic Energy Commission*, 481 F. 2d 1079, 1092 (C.A.D.C.):

> * * * [I]f the Commission's environmental survey is prepared and issued in accordance with NEPA procedures, and if the Commission makes a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, and the irreversible and irretrievable commitment of resources the program involves, we see no reason why the survey will not fully satisfy the requirements of Section 102(C). [App. 10a–11a.]

The court summarized its discussion of the standard of review by stating that in its view the review of an impact statement is limited to the following (App. 12a):

> (1) Whether FES [the Final Environmental Statement] discusses all of the five procedural requirements of NEPA.
>
> (2) Whether the environmental impact statement constitutes an objective good faith compliance with the demands of NEPA.
>
> (3) Whether the statement contains a reasonable discussion of the subject matter involved in the five required areas.

Applying this test to the impact statement before it (App. 12a–16a), the court concluded that the statement satisfied the requirements of NEPA:

> * * * [W]e conclude that the statement is fully acceptable. It adequately discusses future needs and future supplies. It weighs the costs now as

> opposed to the future. It is a comprehensive and thorough document. We disagree with the derogatory comments of the parties and the district court regarding it. [App. 16a.]

Having found the environmental statement to be proper, and having previously found the Secretary's cancellation to be in accord with the Helium Act, the court, without specifically mentioning review under NEPA of the Secretary's substantive decision, reversed the judgment of the district court and remanded with directions to dismiss the action (App. 17a). The concurring judge, while stating that his "differences with the majority [may] go to form rather than substance" (App. 17a), specifically ruled that the Secretary had "balanced the environmental factors with the other pertinent factors" and that his final action in doing so "was neither arbitrary, capricious, nor an abuse of discretion" (App. 19a).

ARGUMENT

1. The standard of review utilized by the court of appeals in reviewing the impact statement was correct and is not in conflict with the standards applied in other circuits. The court of appeals held that in reviewing an agency's undertaking to comply with NEPA a court must require that the agency "do more than mechanically pursue the procedural standards" (App. 10a). It must examine the statement to see whether it in objective good faith discusses each of the environmental matters required by the Act (App. 10a–12a; see p. 7, *supra*). This test, based on the decisions of the Court of Appeals for the District of Columbia Cir-

cuit, is substantially in accord with the standard of review in other circuits. See, *e.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Iowa Citizens* v. *Volpe*, 487 F. 2d 849 (C.A. 8); *Environmental Defense Fund* v. *Armstrong*, 487 F. 2d 814 (C.A. 9), petition for a writ of certiorari pending, No. 73–1179. Seeking to show a conflict among the circuits, petitioners compare the standard followed by the court of appeals in reviewing the impact statement with discussions in other cases concerning the standard appropriate for review of agency substantive decisions (Pet. 22–24). The majority opinion below, however, properly distinguishes those cases (App. 11a, n. 5).

The standard enunciated by the court of appeals, moreover, is no less stringent than that enunciated by the district court. Requiring that an impact statement not be "arbitrary or capricious," the district court's test seems, if anything, less strict than requiring the statement to be a compliance in "objective good faith" with the requirements of the Act. The real difference between the district court decision and that of the court of appeals, in our view, is in their respective *evaluation* of the government's compliance with NEPA, not in the standard of review. As the court of appeals stated in referring to the impact statement:

> It is a comprehensive and thorough document. We disagree with the derogatory comments of the parties and the district court regarding it (App. 16a).

This difference in evaluation of a complex factual issue is not a matter requiring further review by this Court.

2. Contrary to petitioners' contention (see Pet. 15–22), the court of appeals correctly reaffirmed its earlier determination that the Secretary did not violate the Helium Act, and was acting within his contractual rights, in terminating these contracts.[7] The Helium Act authorizes, but does not require, the Secretary to enter into helium purchase contracts. The Secretary, in choosing to enter into such contracts, expressly reserved the right to terminate them if, in his opinion, large new discoveries of helium or diminished requirements or circumstances of a similar nature should make the purchases unnecessary to accomplish the purposes of the Act (see p. 3 *supra*). As we have shown (pp. 3–4, *supra*), these conditions occurred and the Secretary chose to exercise his cancellation power.[8] In view of the enormous quantities of stored helium, important new discoveries and decreased demand (see App. 3a, 108a–110a), the Secretary was well within statutory and contractual bounds in can-

[7] Petitioners incorrectly refer to the termination of these contracts as the "decision to terminate the helium conservation program" (Pet. 16). The Helium Act, 50 U.S.C. 167a(a), grants authority for the "conserving, producing, buying and selling" of helium. These contracts involve only the government's present purchase of helium from private producers. Production of the Bureau of Mines and private production are not curtailed. Nor is the government precluded from again purchasing helium if projected requirements should substantially change.

[8] The Senate Report (No. 1814 (Pt. 1), 86th Cong., 2d Sess. at p. 2 accompanying the 1960 Helium Act amendments stated that the "upward trend in helium demand in all fields is expected to continue." This expectation, as we have shown, proved unfounded.

celling these contracts costing the government approximately $100,000.00 per day for unneeded helium.[9]

3. The court of appeals, after reviewing the impact statement and after finding no violation of the Helium Act or the contracts, reversed the decision of the district court and remanded the case with directions to dismiss the action (App. 17a). The court thus *sub silentio* rejected petitioners' request to overturn the substantive decision of the Secretary as contrary to Section 101 of NEPA. It is possible to read this decision, as petitioners do, as a holding that NEPA, standing alone, provides no basis for substantive review of agency action. In our view, however, it is also possible to read the decision as a determination that the agency action in this case, as demonstrated by the impact statement and the written reasons for termination prepared by the Secretary (App. 97a–119a), was unquestionably not arbitrary or capricious.[10] If the decision is interpreted as petitioners argue, it conflicts with decisions in other circuits that have interpreted NEPA as authorizing substantive review of agency decisions.[11]

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[9] The cost to the government is $40,000,000 per year (App. 3a, 102a).

[10] See the court of appeals' previous opinion in this case at App. 82a, as well as the concurring judge's view summarized at p. 8, *supra*. See, also, *Davis* v. *Morton*, 469 F. 2d 593, 596 (C.A. 10), quoted by the district court below at App. 49a.

[11] *E.g.*, *Sierra Club* v. *Froehlke*, 486 F. 2d 946 (C.A. 7); *Environmental Defense Fund* v. *Corps of Engineers*, 470 F. 2d 289 (C.A. 8), certiorari denied, 412 U.S. 931 (see Pet. 11–15).

There is, in any event, no need for this Court to resolve this possible conflict at this time.

The present case uniquely concerns a contract cancellation under a special statute. Moreover, the Secretary, in addition to the environmental statement, has set forth in a comprehensive document the environmental and non-environmental reasons for his decision to cancel (App. 97a–119a). That document demonstrates that the termination of these contracts was a classic judgmental choice, with substantial arguments supporting the Secretary's decision. Accordingly, as the concurring judge below explicitly held (see p. 8, *supra*), application of the "arbitrary or capricious" standard of review under Section 101 of NEPA to the merits of the Secretary's decision would clearly result in sustaining the decision. For Section 101, while requiring that environmental factors be given weight in federal agency decisionmaking, does not dictate what decision shall be made when environmental considerations are weighed against non-environmental considerations. It does not preclude government decisions based on the judgment that the non-environmental advantages of a decision outweigh its adverse environmental effects. And here, in light of the large quantity of helium already stored, the decreasing demand for helium, the cost of continued purchase, and the speculativeness of any environmental harm, the Secretary's decision to act economically in terminating purchase contracts was hardly arbitrary or capricious. Seen in the light most favorable to the petitioners, the Secretary was charged with making a decision as to

which reasonable men could differ. The decision of the court of appeals is thus correct in sustaining the Secretary's decision, and the factual and legal context of this case is not likely to recur.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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